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IN THE

Supreme Court of the United States

October Term, 1983

STANLEY McDONALD, NORMAN R. HAGFORS and CLAYTON JENSEN,

Petitioners,

vs.

JOHNSON & JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction 1

Argument 2

I. J&J Has Misstated And Mischaracterized The Decision Of The Eighth Circuit And The Record Below 2

II. J&J Agrees That This Court Should Grant Certiorari With Respect To The Plaintiffs' First Two Issues 4

III. Plaintiffs' Execution And Collection Of Their Judgment For Breach Of Contract In No Way Constitutes An Election Of Remedies Terminating This Action 5

TABLE OF AUTHORITIES

Page

Cases:

United States v. Hougham,
364 U.S. 310 (1960) 8

Federal:

DiLeo v. Greenfield,
541 F.2d 949 (2nd Cir. 1976) 8

Essington v. Parish,
164 F.2d 725 (7th Cir. 1947) 9

Gadsden v. Fripp,
330 F.2d 545 (4th Cir. 1964) 8

Luther v. United States,
225 F.2d 495 (10th Cir. 1954) 8

McDonald v. Johnson & Johnson, 537 F.Supp. 1282
(D. Minn. 1982), *aff'd in part, vacated in part,*
722 F.2d 1370 (8th Cir. 1983) 7

McDonald v. Johnson & Johnson,
722 F.2d 1370 (8th Cir. 1983) 7

McGowan v. King, Inc.,
616 F.2d 745 (5th Cir. 1980) 8

Peck v. Richter,
217 F. 880 (8th Cir. 1914) 8

Price v. Franklin Investment Company, Inc.,
574 F.2d 594 (D.C.Cir. 1978) 8

Roberts v. Sears, Roebuck & Co.,
617 F.2d 460 (7th Cir. 1980),
cert. denied, 449 U.S. 975 (1980) 9

Shaver Transportation Company v. Chamberlain,
399 F.2d 893 (9th Cir. 1968) 8

Page

United States use of H&S Industries, Inc. v. F. D. Rich Co., Inc., 525 F.2d 760 (7th Cir. 1975) 8, 9

United States v. Temple, 299 F.2d 30 (7th Cir. 1962) 9

State:

Northwestern State Bank, Osseo v. Foss, 293 Minn. 171, 197 N.W.2d 662 (1972) 9

Statutes:

Sherman Act, Section 1, 15 U.S.C. §1 (1982) 2

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INTRODUCTION

Petitioners above named ("plaintiffs"), pursuant to United States Supreme Court Rule 22.5, hereby file this reply brief addressed to arguments first raised in the brief in opposition by respondent, Johnson & Johnson ("J&J").

ARGUMENT

I. J&J HAS MISSTATED AND MISCHARACTERIZED THE DECISION OF THE EIGHTH CIRCUIT AND THE RECORD BELOW.

Almost all of J&J's brief in opposition (nine of its thirteen pages) consists of J&J's efforts to reargue the evidence and the record in proceedings below. These are the very same efforts J&J made unsuccessfully to the jury, to the trial court, and to the United States Court of Appeals for the Eighth Circuit. It would serve no purpose for plaintiffs to respond to every distortion, misstatement, and inaccuracy in J&J's Brief in Opposition. For a full and accurate understanding, plaintiffs respectfully refer this Court to the thorough and well considered decision of the trial court on J&J's post trial motions, 537 F.Supp. 1282 (D. Minn. 1982); to the decision of the Eighth Circuit, 722 F.2d 1370 (8th Cir. 1983); and to the record itself.

There are, however, several glaring and prominent inaccuracies to which plaintiffs will briefly respond:

(1) *J&J's claim that competition in the TENS market was thriving and could not have been restrained by J&J:*

This is an argument J&J made unsuccessfully to the jury and in the trial court. Because of its ruling on the standing issue, the Eighth Circuit majority never reached the question, although the dissent found more than sufficient evidence to sustain a violation of Section 1 under the rule of reason. As to the TENS market, the trial court correctly found that TENS devices were in competition with drugs in a market

with annual sales in excess of $1 billion. 537 F.Supp. at 1342-44. In light of this competition, any growth in TENS sales from 1975 to 1979, after J&J acquired the plaintiff's business, was "insignificant," and in no way sustained J&J's claim that there had been no suppression of the TENS industry. 537 F.Supp. at 1332-33. Moreover, contrary to J&J's position, the trial court found that there were extremely high barriers to entry in the TENS industry, in that no company could hope to succeed against the drug companies without a massive spending campaign to overcome the ignorance of physicians and the public about TENS devices. 537 F.Supp. at 1290, 1334-35. The Eighth Circuit majority never concluded that these findings were erroneous.

In addition to high barriers to entry, the trial court found that because of J&J's resources and power, J&J was able to police and dominate the remaining firms in the TENS industry, and deter them from innovation and aggressive marketing behavior. 537 F.Supp. at 1332-35. Again, the Eighth Circuit did not disapprove these findings.

As to J&J's alleged investment in the plaintiffs' business after the acquisition, the trial court found this "investment" to be largely illusory, "in the nature of paying past due bills and covering deficits resulting from sales shortfall so as to keep Stimtech out of bankruptcy." 537 F.Supp. at 1333. The Court of Appeals did not differ.

(2) *J&J's claim that it engaged in no anticompetitive conduct or suppression of the plaintiffs' business:*

Again, the trial court found overwhelming evidence that J&J had engaged in a wide range of activity intended to suppress the business of StimTech, 537 F.Supp. at 1333-34; the

Eighth Circuit dissent concurred, 722 F.2d at 1386; and the Eighth Circuit majority found J&J's conduct after the acquisition of plaintiffs' business to have amounted to a bad faith breach of J&J's promises to promote the business, 722 F.2d at 1389, as well as sufficient to support a finding of fraud, 722 F.2d at 1380.

(3) *J&J's continuing misstatement of the plaintiffs' suppression theory:*

J&J has repeatedly sought to characterize the plaintiffs' claim as being that J&J was under some duty affirmatively to promote one of its own products. Plaintiffs have never premised their suppression claim on such a theory, although the acquisition agreement with the plaintiffs in fact so obligated J&J to promote the plaintiffs' business. 722 F.2d at 1389.

Rather, the plaintiffs' claim has at all times been that there is a violation of the antitrust laws when a company goes outside itself to acquire a new product or business *from someone else* for the purpose of suppression. This is what the plaintiffs claimed, what they proved, and what J&J in fact did. *See* Heaney, J., dissenting at 722 F.2d at 1388.

II. J&J AGREES THAT THIS COURT SHOULD GRANT CERTIORARI WITH RESPECT TO THE PLAINTIFFS' FIRST TWO ISSUES.

Significantly, J&J concedes and agrees that this Court should grant certiorari to review the first two questions raised by the plaintiffs' petition: the plaintiffs' antitrust standing, and acquiring to suppress as a violation of the antitrust laws. Plaintiffs concur.

J&J of course qualifies its request that the Court grant certiorari on plaintiffs' issues by conditioning the request on the granting of certiorari on J&J's cross-petition. This tactic, however, is no more than an effort to aggrandize and enhance J&J's cross-petition, which presents no important or unsettled questions, by tying it to plaintiffs' meritorious petition.

III. PLAINTIFFS' EXECUTION AND COLLECTION OF THEIR JUDGMENT FOR BREACH OF CONTRACT IN NO WAY CONSTITUTES AN ELECTION OF REMEDIES TERMINATING THIS ACTION.

J&J attempts to make something, although it is not clear what, of the plaintiffs' execution and collection of the breach of contract judgment in this action. Apparently, J&J contends, somewhat obscurely, that there has been an election of remedies terminating this action and mooting all other claims by reason of the plaintiffs' collecting their damages for breach of contract. Significantly, J&J first raised this wholly frivolous argument only after the Eighth Circuit had finally decided J&J's appeal and denied J&J's motion to stay the mandate; Justice Blackmun of this Court had denied a motion by J&J to stay the mandate; and the plaintiffs had stated an intention to obtain satisfaction of their contract judgment. J&J's argument of election of remedies is wholly contrary to both fact and law. In particular:

(1) *The decision of the Eighth Circuit:*

The decision of the Eighth Circuit is quite clear that by obtaining the contract damages, the plaintiffs would not forego their rights under any other claims in this action. The judgment entered by the Eighth Circuit on November 18,

1983, affirms the breach of contract judgment and remands the fraud for a new trial, while the decision of J&J's petition for rehearing provides that, after the retrial, the contract damages are to be offset only against actual fraud damages, and not punitive damages. 722 F.2d at 1389.

Under the Eighth Ciruit's decision, the fraud punitive damages are thus not alternative to the contract damages, but cumulative—a circumstance that totally undercuts any claim by J&J that the Eighth Circuit or the District Court ever intended the purpose of alternative judgments in this case to be that plaintiffs would waive any right to proceed on other claims by collecting the contract damages.

(2) *J&J's efforts to stay the Eighth Circuit mandate:*

In opposing J&J's motion to stay the Eighth Circuit mandate, the plaintiffs made clear their intention to obtain payment of the contract damages as soon as possible without waiving or extinguishing their rights to proceed with the other claims in this action.

After considering plaintiffs' position, the Eighth Circuit denied a stay of the mandate (a ground for denying the stay being that the issues to be presented in J&J's petition for certiorari "would not likely be appropriate for determination by the Supreme Court." Eighth Circuit Rule 18). Justice Blackmun of this Court concurred with the Eighth Circuit, and also denied a motion by J&J to stay the mandate.

(3) *The District Court's order clarifying the judgment:*

Because of J&J's belated assertion that acceptance of the contract damages would extinguish all other claims, the plaintiffs moved for and obtained an order from the District Court

clarifying the judgment in this case. The trial court's order clearly establishes that it was never the intent or effect of the judgment that acceptance of damages on one claim would preclude the plaintiffs from seeking a greater amount under any of the remaining claims. On April 17, 1984, the District Court ordered

> "that the purpose, meaning and effect of the judgment herein, entered pursuant to the decision of the United States Court of Appeals for the Eighth Circuit in *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983) and the decision of this court denying the post-trial motions herein, *McDonald v. Johnson & Johnson*, 537 F.Supp. 1282 (D.Minn. 1982) are and have always been that the plaintiffs shall not waive or extinguish their rights to proceed under any other claims herein by securing payment of the damage award for breach of contract; and the intention, meaning, and effect of said judgment are and have always been only that damages awarded on the plaintiffs' claims herein shall not be cumulated, except, pursuant to the decision of the United States Court of Appeals for the Eighth Circuit in *McDonald v. Johnson & Johnson, supra*, any recovery of contract damages is to be offset only against any award of compensatory damages for fraud, and not against any award of punitive damages for fraud."

(4) *J&J's conduct after payment of the contract damages:*

J&J's own conduct after paying the contract damages demonstrates just how little credence J&J places in its frivolous claim that this action has terminated. First, J&J has never tried to seek review of the District Court's order in the

Eighth Circuit, either by appeal or otherwise, and has filed no motion in the District Court to dismiss the action for mootness. To the contrary, J&J has proceeded full speed ahead in the District Court, with a motion to disqualify the District Court judge, a motion for continuance of the retrial on the fraud claims, and deposition notices, all involving proceedings *after* payment of the contract judgment.

(5) *The contrary state of the law:*

The law on this issue is directly contrary to J&J in all respects. The law is clear that a litigant who is absolutely entitled to a specific sum, as were the plaintiffs to the contract damages, may secure payment of that sum without foregoing the right to proceed further in the litigation, either through appeal or prosecution of other claims. *United States v. Hougham,* 364 U.S. 310, 312 (1960); *Peck v. Richter,* 217 F. 880, 881 (8th Cir. 1914); *Luther v. United States,* 225 F.2d 495, 497 (10th Cir. 1954):

> ". . . [W]here a judgment or decree adjudicates separable or divisible controversies, the appealing party may accept the benefit of the separate or divisible feature in his favor and challenge the feature adverse to him, *or where the appealing party is entitled to some amount in any event, he may accept such sum and ask that the balance of the judgment or decree be reviewed.*" (Emphasis added.)

DiLeo v. Greenfield, 541 F.2d 949, 952-53 (7th Cir. 1976); *Gadsden v. Fripp,* 330 F.2d 545, 548 (4th Cir. 1964); *McGowan v. King, Inc.,* 616 F.2d 745, 747 (5th Cir. 1980); *Shaver Transportation Company v. Chamberlain,* 399 F.2d 893, 895 (9th Cir. 1968); *United States use of H&S Industries, Inc. v.*

F. D. Rich Co., Inc., 525 F.2d 760, 764 (7th Cir. 1975); *Price v. Franklin Investment Company, Inc.*, 574 F.2d 594, 597 (D.C.Cir. 1978).

The principal circumstance under which collection of a judgment constitutes an extinguishment of remaining claims is where the defendant has tendered payment as a compromise and accord and satisfaction. This, clearly, is not the situation here, and J&J has never claimed there has been an accord and satisfaction.

Nor do the cases cited by J&J at pages 2-3 of its brief in opposition provide any support for its position. The first two cases involve the election of remedies that must be made between rescission and an action for damages for breach of contract, *Northwestern State Bank, Osseo v. Foss*, 293 Minn. 171, 197 N.W.2d 662 (1972); *Roberts v. Sears, Roebuck & Co.*, 617 F.2d 460 (7th Cir. 1980), *cert. denied*, 449 U.S. 975 (1980); the third involves an effort by the government to recover the same damages twice, *United States v. Temple*, 299 F.2d 30 (7th Cir. 1962); and the fourth involves the necessity to elect between inconsistent theories, *Essington v. Parish*, 164 F.2d 725 (7th Cir. 1947). None of the foregoing situations is present here. The plaintiffs are not simultaneously pressing claims for rescission and damages, do not seek to recover the same damages twice, and are not pursuing inconsistent claims.

Respectfully submitted,

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